In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1326

ROBERT LUFTIG, PETITIONER

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE, AND STANLEY RESOR, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner is a soldier lawfully inducted into the United States Army and stationed at Fort Benning, Georgia. Alleging that United States military action in Vietnam is illegal because Congress has not formally declared war and because such action (in his view) violates certain treaties and international agreements, petitioner sued to enjoin the Secretary of Defense and the Secretary of the Army from trans-

ferring him to Vietnam and to declare the American military activity there illegal. The district court dismissed the suit. *Luftig* v. *McNamara*, 252 F. Supp. 819 (D. D.C.) (Pet. App. 28).[1] The court of appeals affirmed, agreeing with the district court that the suit was "a claim for judicial review of political questions beyond its jurisdiction and that it was an unconsented suit against the United States." 373 F.2d 664 (Pet. App. 33).[2] This decision is plainly correct, and there is no occasion for further review.

1. This is an unconsented suit against the United States. Although petitioner purports to sue respondents in their private capacities, the relief he seeks would prevent the Secretary of Defense and the Secretary of the Army from exercising their judgment regarding the most effective deployment of a member of the United States Army.[3] Thus, "the effect

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[1] This was petitioner's second suit to obtain a federal court order against his transfer to Vietnam. His previous action, raising the identical contentions, was dismissed by the United States District Court for the Northern District of California on February 18, 1966, as "moot and upon the further ground that this court lacks jurisdiction of the subject matter to stay any movement of [petitioner] pursuant to military orders." *Luftig* v. *Ferguson, Commanding Officer, Fort Ord, et al.*, No. 44,700 (Pet. App. 33). Petitioner did not appeal.

[2] Petitioner's requests for injunctive relief precluding his transfer to Viet-Nam *pendente lite* were denied by the court of appeals on April 29, 1966 (J.A. 13), and by the Chief Justice on May 26, 1966 (J.A. 13-14).

[3] Petitioner has never challenged the lawfulness of his induction into military service and does not seek release from the Army before the normal expiration of his term of service.

of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan* v. *Rank*, 372 U.S. 609, 620; *Hawaii* v. *Gordon*, 373 U.S. 57, 58; *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 704. And the conduct complained of by petitioner is within the authority vested by the Constitution in the Executive.

The President possesses "in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs" (*Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 109), and his "very delicate, plenary and exclusive power" in the field of foreign relations "does not require as a basis for its exercise an act of Congress * * *" (*United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320). This authority extends to military activity. This Court has long held that "hostilities may subsist between two nations" without a declaration of war (*The Eliza*, 4 Dall. 37, 40)[4] and that authority to direct such hostilities is implicitly granted the President by the Constitution (see *In re Neagle*, 135 U.S. 1, 64). The "Executive has used force abroad at least a hundred times to accomplish national purposes without reference to Congress." Rogers, *World Policing and the Constitution* (1945), p. 56; see H. Rep. No. 127, 82d Cong., 1st Sess., pp. 55-62; H. Doc. No. 443, 84th Cong., 2d Sess. At all events Congress has

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[4] See, also, *Durand* v. *Hollins*, 8 Fed. Cases 111 (C.C.S.D. N.Y.) (Mr. Justice Nelson); H. Rep. No. 127, 82d Cong., 1st Sess., p. 20.

approved the action taken under the independent authority of the President in Vietnam, both expressly (in the "Gulf of Tonkin Resolution," 78 Stat. 384) and by appropriating funds to support it (Pub. L. 89-18, 79 Stat. 109; Pub. L. 89-367, 80 Stat. 36). Nor is the Vietnam activity in violation of our treaty obligations. See Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, Department of State Bulletin, March 28, 1966.

2. Since this suit asks judicial intervention in the conduct of foreign policy, the courts below properly held that it presents a non-justiciable political question. This is not a case that merely "touches foreign relations" (*Baker* v. *Carr*, 369 U.S. 186, 211); it involves a direct challenge to the wisdom of the Executive's decision as to how our foreign relations should be conducted. Clearly, "recognition of belligerency abroad is an executive responsibility." *Id.* at 212. As this Court said in *Johnson* v. *Eisentrager*, 339 U.S. 763, 789:[5]

> Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. * * * The issue tendered * * * involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible.

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[5] See, also, *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111; *Baker* v. *Carr*, *supra*, at 217; *Marbury* v. *Madison*, 1 Cranch 137, 166; *Eminente* v. *Johnson*, 361 F.2d 73 (C.A.D.C.), certiorari denied, 385 U.S. 929.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

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